No. 85-1551

(5)

Supreme Court, U.S.
FILED
APR 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, et al.,
Appellants

v.

JEFFREY MAY, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE, STATES OF CONNECTICUT, ARIZONA DELAWARE INDIANA, LOUISIANA, MICHIGAN, NEVADA AND NEW MEXICO

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Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
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INTEREST OF AMICI

The State of Connecticut, like New Jersey and the other amici states, has a statute that requires each local or regional board of education to "provide opportunity at the start of each day to allow those students and teachers who wish to do so, the opportunity to observe such time in silent meditation." Conn. Gen. Stat. § 10-16a (1987). *See also Wallace v. Jaffree*, 105 S.Ct. 2479, 2498 & n.1 (1985) (O'Connor, J., concurring in the judgment) (listing the statutes). The United States Court of Appeals for the Third Circuit held that such a statute violates the Establishment Clause of the First Amendment, at least when the legislative history of the statute, read expansively, reveals a religious and not a secular purpose. While it may be possible to distinguish the legislative history of the moment of silence statute in Connecticut and other states from that in New Jersey, Connecticut and the other amici states nonetheless believe that the decision of the Court of Appeals, if not reversed, may affect the implementation of their laws. Since Connecticut and the other amici states have a desire, expressed in law, to maintain the practice of holding a moment of silence in their public schools, Connecticut and the other states, therefore, obviously have an interest in this case.

Our interest also stems from a broader consideration. The overly-intrusive inquiry into legislative motive sanctioned by the Court of Appeals in this case could, if upheld, cast doubt on any number of state statutes designed to accommodate, in a neutral fashion, religion and other personal factors into the stream of everyday public affairs. For that matter, the approach approved by the Court of Appeals might unfairly jeopardize statutes in other social and economic areas by exposing improper or discriminatory motives that do not accurately represent the intent of the legislature. The interest of Connecticut and the other amici states in this case is thus the concern that selective interpretation of legislative history may unnecessarily invalidate many important state statutes.

SUMMARY OF ARGUMENT

The issue in a case of this nature is no longer whether a moment of silence statute on its face is constitutional. In light of *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985), little serious dispute can exist that it is. The issue is rather whether evidence exists in the legislative history of the statute revealing that what on its face appears to be a neutral accommodation of religion and other concerns is in reality a pretext for the sole purpose of endorsing or establishing religion.

In analyzing this issue courts should not lightly conclude that a state legislative body has engaged in a game of subterfuge. A legitimate inquiry into motive should not become a quixotic search for purity. If it does, few statutes of this nature may survive.

ARGUMENT

IN DECIDING THE CONSTITUTIONALITY OF A FACIALLY NEUTRAL MOMENT OF SILENCE STATUTE, INQUIRY INTO LEGISLATIVE MOTIVE SHOULD BE APPROPRIATELY DEFERENTIAL.

1. Little serious dispute can now exist about the facial validity of a moment of silence statute that merely authorizes interested students to spend a moment of their school day in silent contemplation. This Court's majority opinion in *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985), made clear that "[t]he legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day." *Id.* at 2491. One member of the majority and all four other members of the Court authored separate opinions that went at least as far as to state that moment of silence statutes should survive facial constitutional attack. *Id.* at 2493 (Powell, J., concurring); *id.* at 2496–2501 (O'Connor, J., concurring in the judgment); *id.* at 2505 (Burger, C.J., dissenting); *id.* at 2508 (White, J., dissenting); *id.* (Rehnquist, J., dissenting). And even the Court of Appeals in this case conceded that "in the abstract a statute such as [New Jersey's moment of silence law] would not, in the opinion of the Supreme Court, be deemed invalid under the purpose leg of *Lemon v. Kurtzman*, [403 U.S. 602, 612–13 (1971).]." *May v. Cooperman*, 780 F.2d 240, 251 (3d Cir. 1985), *prob. juris postponed*, 107 S.Ct. 946 (1987).

This concensus merely recognizes that moment of silence statutes generally represent a permissible reconciliation of the tension between our right to the free exercise of religion and our prohibition on the establishment of religion. *See Walz v. Tax Commission*, 397 U.S. 664, 667–70 (1970). Surely few would contend that the government, consistent with the Free Exercise Clause, could categorically forbid students from praying silently on school grounds. The case is not significantly different when, as here, the government merely informs those

students that, if they wish to pray silently, they may do so at a designated time when other students may, if they wish, engage in silent nonreligious thought. As long as the government itself does nothing to favor those who wish to pray, the Establishment Clause is not offended, for the decision to pray stems not from the government's action but from "the genuinely independent and private choices" of the students. *Witters v. Washington Department for the Blind*, 106 S.Ct. 748, 752 (1986). *See also* L. Tribe, *American Constitutional Law* 829 (1978) (suggesting that even a statute requiring rather than permitting students to observe a moment of silence would not violate the Establishment Clause).

2. The real question in a case of this nature is thus whether credible evidence exists in the legislative history of a moment of silence statute that would undermine the statute's facial neutrality. *See Wallace v. Jaffree*, 105 S.Ct. at 2490–93. The mere presence, however, of some evidence of religious motive will not suffice. Only if the legislative history reveals the legislature to have been motivated "entirely" by religious concerns and to have had no secular purpose at all would a moment of silence statute run aground of the Establishment Clause. *Id.* at 2490. An Establishment Clause violation will arise, in other words, only if "the secular purpose articulated by the legislature is merely 'sham.' " *Witters v. Washington Department of Service for the Blind*, 106 S.Ct. at 751.*

Presumably a state legislature will not engage in a sham proceeding. Cases such as *Wallace v. Jaffree, supra*, in which the legislative history revealed unequivocally that the law represented solely an effort to return voluntary prayer to the schools, *id.* at 2490, form the exception rather than the rule.

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* We assume, as the Court of Appeals decided, that a moment of silence law will not have a primarily religious effect and will not foster excessive governmental entanglement with religion. *May v. Cooperman*, 780 F.2d at 247–50. Thus, the only real Establishment Clause issue is whether the statute has a secular purpose. *Lemon v. Kurtzman, supra.*

It seems fair to assume in the first instance that a legislature has acted in an honest and constitutional manner. *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (plurality opinion).

This assumption alone militates against the practice of conducting an overly-intrusive inquiry into legislative motive. Yet other, more practical reasons exist as well. An exhaustive search for evidence of a hidden legislative agenda, such as the search sanctioned by the Court of Appeals in this case, will seldom turn up empty-handed. No doubt that by crediting the testimony of witnesses present at legislative hearings, newspaper accounts of the hearings, evidence of the perceptions of citizens about the statute's purpose, and expert testimony about the statute's value—as the district court did in this case, *see May v. Cooperman*, 780 F.2d at 252 n.9; *id.* at 261 (Becker, J. dissenting)—a court can usually discover evidence of ulterior legislative motive. The same is true if a court looks indiscriminately at legislative floor debates. *See Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394–95 (1951). Few statutes in this controversial area can survive the test of absolute purity.

It is inappropriate to examine with a fine-toothed comb the wellsprings of legislative action. Courts are not equipped to do so, and the results are likely to be misleading. An inquiry into the purpose of the legislature in enacting a moment of silence law should accordingly be "deferential and limited." *Wallace v. Jaffree*, 105 S.Ct. at 2500 (O'Connor, J., concurring in the judgment). More generally, as well, in assessing whether any state statute has a proper public purpose courts must exercise "the most extreme caution." *Everson v. Board of Education*, 330 U.S. 1, 6 (1947).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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